SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 1015

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois.

Respondents.

(On Writ of Certiorari to the Supreme Court of Illinois)

BRIEF OF RESPONDENT PEOPLE OF THE STATE OF ILLINOIS

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BRIEF OF RESPONDENT PEOPLE OF THE STATE OF ILLINOIS

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 36 Ill. 2d 471, 224 N.E. 2d 259 (1967).

JURISDICTION

This is adequately set forth in Petitioner's Brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

These are adequately set forth in Petitioner's Brief.

QUESTIONS PRESENTED

1) Whether the trial court abused his discretion in excusing jurors who indicated that they would not, regardless of the evidence, impose a punishment provided for by law?

2) Whether a few inconclusive and incomplete psychological studies are sufficient to show as a matter of "demonstrable reality" that the petitioner was deprived of a trial by impartial jurors, when the jurors indicated that they could be impartial and when there was no claim to the contrary until six years after the trial concluded?

3) Whether it was arbitrary to exclude all persons who indicated a deep-seated bias which would preclude them from being impartial jurors?

4) Whether a defendant is entitled to a jury which is absolutely representative of community thinking, when there has been no arbitrary exclusion of any identifiable group of qualified individuals?

SUPPLEMENTAL STATEMENT OF FACTS

While Petitioner Witherspoon's Statement of Facts is generally accurate and substantially complete, the Statement should be supplemented to the following extent:

The Murder

On April 29, 1959, William Witherspoon shot and mortally wounded a uniformed Chicago policeman while he was attempting to evade arrest. At the time of the shooting, there were three outstanding warrants for Witherspoon's arrest; two of these warrants charged Witherspoon with armed robbery, and one charged him with unlawful flight to avoid prosecution. (A. 72, 77, 83)* Shortly after the shooting, Witherspoon was apprehended and taken to the police station. While in custody, he informed the police that the tattoo on his right hand knuckles, which read "H-A-T-E", meant that he hated police. (A. 100). He also explained the shooting: "I was hot and I didn't want to be taken in. I was wanted for robberies in Detroit, I had been in the penitentiary before and I didn't want to go back, that's why I shot." (A. 54)

The Trial

At the trial on a charge of murder, Witherspoon was represented by three court-appointed attorneys, one of whom was then head of the Chicago Bar Association Defense of Indigents' Committee.

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*The People have adopted the form of citations used by the Petitioner. Thus "A" refers to the printed Abstract filed in the Supreme Court of Illinois on petitioner's original appeal. (No. 36277) "R" refers to the transcript of petitioner's trial, not printed. "Abst." refers to the printed Abstract filed in the Supreme Court of Illinois on this appeal (No. 39387) "App." refers to the various appendices to this Brief.

Immediately after the various attorneys were introduced, the trial judge explained the purpose of the *voir dire* examination:

> "Now, what we are trying to do here in these cases is to get twelve men and women who can take the box and fairly and impartially try this case for both sides. In other words, you don't have any leaning for the State or you don't have any leaning for the defendant. Your mind is completely neutral. You decide the case from the evidence you hear from the witness stand and you're bound by the law that the court gives to you, in written instructions, which will be given to you at the close of the case." (Rec. 634)

When the first prospective juror (Clifford Salazar) was asked whether he had "conscientious or religious scruples against imposition of the death penalty in a proper case", he was unable to understand the question, so the Assistant State's Attorney and the judge explained exactly what was meant when that question was asked:

> "Q. . . . What the Judge and I are asking is this: If you're one of the twelve jurors, our testimony will be developed on the witness stand, and then, when all the witnesses are through testifying, his Honor, Judge Salter, will give you the rules of law that apply to a charge such as this, and then you and the other eleven would retire to the jury room. And if it should be your opinion, along with the other eleven jurors, all twelve of you agree that the defendant Witherspoon is guilty of murder and that death in the chair is a proper verdict, would you say so by signing a guilty verdict?
>
> "A. No, sir.
>
> "The Court: In other words, you don't believe that you would vote to inflict the death penalty in any case?
>
> "A. No.

"Q. In other words, what counsel is getting at is this: If you have a conscientious or religious scruple against the infliction of the death penalty, say so to the gentleman.

"A. Yes, sir." (*Petitioner Witherspoon's Brief*, App. 2)

It was only then that Mr. Salazar was excused. As is common in most states, the other members of the venire were then present in the courtroom and were able to hear that explanation, and they had previously been instructed to listen to the examination. (R. 636) Subsequently, the prospective jurors were generally excused when they answered affirmatively to the question—"Do you have a conscientious or religious scruple against infliction of the death penalty in a proper case?"—but periodically the judge, in the hearing of the other prospective jurors, made sure that the scrupled juror would not, regardless of the evidence, return any death verdict.

Thus the 11th juror examined (Casimir Mlyniec) was questioned as follows:

"Prospective Juror Mlyniec: I couldn't go all the way, though, because I couldn't see to put a man to death.

"Mr. Cronin: Cause, your Honor.

"Mr. Cernek: Let the State inquire.

"The Court: Q. In other words, you have a conscientious scruple against the infliction of the death penalty in a proper case?

"Juror Mlyniec: Yes, sir.

"The Court: Q. Regardless of the evidence. In no case would the evidence be strong enough to satisfy you that the death penalty should be inflicted?

"A. Yes, sir.

"The Court: All right, challenge for cause. Step aside." (*Petitioner Witherspoon's Brief*, App. 8)

And again the 15th juror examined (Julia Darcy) was questioned even after she said she had religious scruples and even after the State had moved to excuse her.

"Q. Do you have a conscientious or religious scruple against the infliction of the death penalty in a proper case?

"A. I have a religious scruple.

"Mr. Kissane: Cause, Judge.

"The Court Q. In other words, did I understand you to say that you wouldn't vote for the death penalty in any case regardless of the evidence?

"A. Yes, sir.

"Q. We haven't heard the evidence here yet. We don't know what it will be but it will be developed from the witness stand. But I understand that your position is that you have a religious scruple against the infliction of the death penalty in any case?

"A. Yes, sir.

"The Court Challenge for cause is granted. Step aside." (*Petitioner Witherspoon's Brief,* App. 10, 11)

The 58th juror examined (Prospective Juror No. 226) was excused when he said he didn't believe in the death penalty even though it was the law of the state. (*Petitioner Witherspoon's Brief,* App. 29)

Later, the 78th juror examined (Helen Jedinak) initially said that she had religious and conscientious scruples against infliction of the death penalty in a proper case, yet the judge persisted in the questioning and tendered her to the attorneys when it appeared that she had no such scruples, but merely did not want the responsibility of imposing the death penalty. It was not until she expressly stated she could not be fair and impartial that the judge excused her for cause. (*People's Brief,* App. C)

The 81st juror examined (Prospective Juror No. 86) was excused when he flatly said he would not vote for the the death penalty no matter what the evidence was.

"The Court: To save time, I want to ask you this question:—It's really the lawyer's duty but, then, I'm pinch hitting for both sides here—Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

"Prospective Juror 86: Yes, I do.

"The Court: It doesn't make any difference what the evidence is, you'd never vote for the death penalty?

Prospective Juror 86: No." (*Petitioner Witherspoon's Brief*, App. 37, 38)

The 88th juror examined (Prospective Juror No. 70) was excused after the following questioning:

"The Court: Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

"Prospective Juror 70: Yes, I have, your Honor.

"The Court: How do you entertain such scruples?

"Prospective Juror 70: Well, I have been a Catholic all my life and I don't believe in the death penalty, that's all.

"The Court: It isn't against your religion, is it?

"Prospective Juror 70: No, it isn't.

"The Court: Then it's a personal opinion?

"Prospective Juror 70: Yes, sir.

• • •

"The Court: You disbelieve it, regardless of what the evidence is? We don't know what the evidence is in this case, but it's a murder charge and we don't know, from the evidence, whether the death penalty warrants it. The State is qualifying, as you heard,

for the death penalty. But your position is that you wouldn't vote for the death penalty in any case?

"Prospective Juror 70: No, sir." (*Petitioner Witherspoon's Brief*, App. 40, 41)

Aside from the questioning of prospective jurors in regard to conscientious or religious scruples, the trial court, at several points during the *voir dire* examination, reemphasized that the purpose of the examination was to get a fair trial for both sides. For example, on questioning it developed that one prospective juror (Paul Ongena) had a brother whose son-in-law was a policeman, and when he admitted that he was uncertain whether this would effect him, he was excused for cause upon the defendant's motion. (*People's Brief*, App. C)

And again later on, the judge excused a policeman's wife (Agnes Giles, 86th juror examined) despite the fact that she said she had no "leanings" one way or the other.

"Q. What we try to do here is to get 12 men and women to start out where there is no possibility to have any leaning one way or another.

"A. That's right.

"The Court: It appears to the court that it is probably not conscious to you. You might have some leaning. I'll grant the challenge for cause. You may stand aside.' '(Rec. 969)

At no point did any of the three defense counsel attempt to bring out that any of the jurors excused might have been able to return a guilty verdict despite their conscientious and religious scruples. At no point did the defendant's attorneys object to these jurors being excused for having scruples. When the jury had finally been picked, the defendant still had three peremptory challenges left. (*People's Brief*, App. A, "Totals")

Post-Conviction Proceedings

These are adequately detailed in Petitioner Witherspoon's Statement of Facts. However, it should be noted that Witherspoon, though indigent, has been represented by some of the most experienced and competent counsel in Illinois throughout all of the proceedings.

SUMMARY OF ARGUMENT

The Constitution requires that jurors be "impartial", and since the birth of our Nation this phrase has been construed to disqualify anyone who indicates a bias or prejudice which prevents him from rendering a true verdict on the law and the evidence. The jurors who were excused for having conscientious or religious scruples indicated that they would not under any circumstances prescribe a penalty provided for by law, and the trial court did not act arbitrarily or abuse his discretion in excusing such individuals. The persons excused had nothing in common except a bias in the defendant's favor, and petitioner failed to show as a matter of demonstrable reality that he was deprived of a trial by twelve impartial jurors. Furthermore, petitioner's right to a "cross-section" of the community does not give him the right to have on his jury persons who are biased in his favor.

PREFATORY STATEMENT

At the outset the People would like to comment briefly regarding certain subjects argued by the various *amicus curiae* briefs, lest the People's failure to either argue or comment on these points be deemed an inability to meet the arguments presented. The subjects referred to are two: First, it is earnestly argued that the death penalty is unwise. Secondly, it is argued that a decision herein should be deferred until after evidentiary hearings and until the issue presented herein can be considered in conjunction with other allegedly related issues.

In regard to the first subject, the People have made no attempt to meet the arguments raised thereon. The contentions for and against capital punishment are many, varied and often emotional. The arguments on both sides have been made every time the Illinois Legislature has convened since the year 1957, and the People feel that such is the proper forum for them. Aside from this comment, the People would only note that there are two cases pending in the Illinois courts which provide strong support for those who would retain the death penalty. In one case the accused was convicted of methodically slaughtering eight nurses, six of whom were bound and helpless. (*People* v. *Speck,* 67-4-20-27, Circuit Court, Peoria County). In the other case, a convict—who was already serving a 25-year sentence for murder—was convicted of killing three prison guards. (*People v. Bassett, et al.,* 554-66, 555-66, 556-66, Circuit Court, Sangamon County)

In regard to the second subject, petitioner Witherspoon has already sought review on two occasions of many of these so-called intertwined constitutional issues. On the first occasion, *certiorari* was denied completely [337

F. 2d 427 (7th Cir. 1964), *cert. den.*, 379 U.S. 950 (1964)], and on this last occasion, *certiorari* was granted for consideration of a relatively narrow issue which is now ripe for determination. In the petition for post-conviction relief (which gave rise to this review) there was a general request for a hearing, but petitioner's counsel expressly stated in the trial court that no evidentiary hearing was necessary or requested as to the issue on which certiorari was later granted. (R. Vol. IV, p. 0210) The petitioner has mainly directed himself to arguing this one issue, and the People have done likewise in the following pages. As to the other "related issues", the People have confidence that the lower federal courts will be able to adequately interpret the federal Constitution. Substantial and current federal questions have always been accepted and considered by this Court as the cases arose and as the issues were ripe for determination, but after the lower courts had considered the problems and had an opportunity to resolve them. The People suggest that this traditional procedure is much more fitting than the approach now suggested, that of deferring action until a sweeping review of state capital trial criminal procedure can be undertaken. One problem has been accepted and fully argued. That issue is capable of resolution now, and the People submit that it should be resolved in its favor.

In light of these considerations, the People of the State of Illinois have not attempted to meet many contentions made in the briefs filed by the *amicus curiae*.

ARGUMENT

I.

THE ILLINOIS STATUTE WAS APPLIED ONLY TO EXCLUDE THOSE PROSPECTIVE JURORS WHO COULD NOT BE "IMPARTIAL" AS REQUIRED BY THE FEDERAL CONSTITUTION, AND THE PETITIONER WAS NOT DEPRIVED OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY ON THE QUESTION OF GUILT OR INNOCENCE BY THE PRACTICES EMPLOYED BY THE TRIAL COURT.

A.

The Constitution requires that jurors be impartial as to both the defendant and the government.

The Constitution guarantees every accused the right to trial by an impartial jury, but such impartiality requires not only freedom from bias against the accused, but also from any prejudice against the prosecution. [*Hayes* v. *Missouri,* 120 U.S. 68, 70 (1887). See *Swain* v. *Alabama,* 380 U.S. 202, 220 (1965)] And any juror who has conscientious scruples on any subject, which prevent him from standing indifferent between the government and the accused, is not an impartial juror. [*Logan* v. *United States,* 144 U.S. 263, 298 (1892)]. It is not enough that the juror be impartial as to guilt; he must also be able to exercise his discretion as to punishment, freely and without any preconceived impediments. [*Piccott* v. *State,* 116 So. 2d 626, 628 (Sup. Ct. of Fla. 1959), *cert. den.,* 364 U.S. 293, 81 S. Ct. 106 (1960)]. "To insist on a

juror's sitting in a cause when he acknowledges himself to be under influences, no matter whether they arise from interest, from prejudice, or from religious opinions, which will prevent him from giving a true verdict according to law and evidence, would be to subvert the objects of a trial by jury, and to bring into disgrace and contempt, the proceedings of courts of justice. We do not sit here to produce the verdicts of partial and prejudiced men; but of men, honest and indifferent in causes. This is the administration of justice [which is required]." [*United States* v. *Cornell*, 25 F. Cas. 650, 655, 656 (1820) (Case No. 14, 868)]

B.

The trial court excused only those jurors who indicated that they could not be impartial, and in doing so it was acting reasonably and within the discretion traditionally allowed a trial court.

When the first juror was asked if he had any conscientious or religious scruples against imposition of the death penalty, he was unable to understand what this meant, so the Assistant State's Attorney and the judge explained exactly what was meant by that question:

> "What the Judge and I are asking is this: If you're one of the twelve jurors, our testimony will be developed on the witness stand, and then, when all the witnesses are through testifying, his Honor, Judge Salter, will give you the rules of law that apply to a charge such as this, and then you and the other eleven would retire to the jury room. And if it should be your opinion, along with the other eleven jurors, all twelve of you agree that the defendant Witherspoon is guilty of murder and that death in the chair is the

proper verdict, would you say so by signing a guilty verdict?

A. No, sir."

"The Court: In other words, you don't believe that you would vote to inflict the death penalty in any case?

"A. No.

"Q. In other words, what counsel is getting at is this: If you have a conscientious or religious scruple against the infliction of the death penalty, say so . . .

"A. Yes, sir." (*Petitioner Witherspoon's Brief,* App. 2)

This explanation conforms to Illinois decisional law. [*Gates* v. *People,* 14 Ill. 433, 435 (1953); *People* v. *Hobbs,* 35 Ill. 2d 263, 270 (1966), *cert. den.,* 386 U.S. 1024 (1967)] and it is consistentent with the general thought that a "conscientious scruple" signifies not merely a general dislike for capital punishment, but rather an inability to render a fair and impartial verdict on the law and evidence [*E.g., Turberville* v. *United States,* 303 F. 2d 411, 419, 420 (D.C. Cir. 1962), *cert. den.,* 370 U.S. 946, 82 S. Ct. 1596, 8 L. ed. 2d 813 (1962)].

It is clear that the juror was excused only after he admitted that he would not return a verdict allowed by law. Since the other prospective jurors on that venire were present in the courtroom when the explanation was made, and since they had previously been instructed to listen to the examination (R. 636), it was obviously not necessary to repeat the meaning of the question each time. If there had been more extensive questioning, there might well have been a claim later that the death penalty was unduly emphasized. [Cf. *People* v. *Crump,* 5 Ill. 2d 251, 264 (1955)] Periodically the judge made sure that the pros-

pective juror, who stated he had scruples, was unalterably opposed to imposing a death penalty under any circumstances, and no more than that was practical or required. An affirmative answer to the question asked—"Do you have any conscientious or religious scruples against imposition of the death penalty in a proper case?"—clearly indicated that the juror would not under any circumstances return a verdict calling for the death penalty, and any further probing—in the absence of any objection or questions by the defense attorneys—was unnecessary and would merely have embarrassed the juror. [*United States* v. *Puff*, 211 F. 2d 171, 186 (2d Cir. 1954), *cert. den.*, 347 U.S. 963 (1954)]. As Judge Learned Hand once noted:

> "If trial by jury is not to break down by its own weight, it is not feasible to probe more than the upper levels of a juror's mind." [*United States* v. *Dennis*, 183 F. 2d 201, 227 (2d Cir. 1950), *aff'd.*, 341 U.S. 494 (1951)].

The upper levels of the prospective juror's mind were probed by use of the question asked, and by answering "yes" to that inquiry as it was explained initially, the prospective juror indicated an inability to render the fair and impartial verdict which the trial court consistently emphasized that they were seeking. As early as 1813 this Court recognized the importance of excluding jurors who indicated some bias:

> "[Jurors] ought to stand perfectly indifferent between the parties, and although the bias which was acknowledged in this case might not perhaps have been so strong as to render it positively improper to allow the juror to be sworn on the jury, yet it was desirable to submit the case to those who felt no bias either way." [*Mima Queen & Child* v. *Hepburn*, 11 U.S. (7 Cranch) 290, 297 (1813)]

Furthermore, the trial court traditionally has been entrusted with determining whether a juror's views were strong enough to show partiality, and its findings are not generally set aside unless error is manifest. [See *Spies* v. *Illinois,* 123 U.S. 131, 179 (1887)]. Here there was no manifest error, since the trial court was acting in accordance with long-standing and well-settled law when it excused those individuals whose scruples prevented them from imposing the death penalty. [See Annot., 48 A.L.R. 2d 560 (1954), listing the jurisdictions where this question has previously arisen and showing that the courts of 36 out of 38 jurisdictions have held that jurors with conscientious or religious scruples against capital punishment should be excused for cause. Also *Cf. Miles* v. *United States,* 103 U.S. 304, 310 (1880)].

It is argued in opposition to the People that there was an abuse of discretion, because the jurors excused might nonetheless have been able to return a guilty verdict, because the jurors excused were still able to exercise their discretion as to punishment, and because the State's right to impartial jurors on the question of punishment cannot supersede the defendant's right to an impartial jury on the question of guilt or innocence. These contentions will be met in that order.

In regard to the first contention, it is generally recognized in Illinois and in other jurisdictions that a "conscientious or religious scruple" against the death penalty consists of more than a mere theoretical or general dislike for capital punishment. [*Turberville* v. *United States,* 303 F. 2d 411, 419, 420 (D.C. Cir. 1962), *cert. den.,* 370 U.S. 946, 82 S. Ct. 1596, 8 L. ed. 2d 813 (1962). Also see *Gates* v. *People,* 14 Ill. 433, 434 (1853)] At no point did any of

defendant's three trial counsel make any attempt to amplify the juror's views, and as the Record stands, each juror who answered the question affirmatively, to signify such scruples, was excused only for indicating an inability to render a fair and impartial verdict generally. [*Turberville* v. *United States,* 303 F. 2d 411, 420 (D.C. Cir. 1962), *cert. den.,* 370 U.S. 946, 82 S. Ct. 1596, 8 L. ed. 2d 813 (1962)]. This was apparently so reasonable and obvious that defense counsel made no objection to the prospective jurors being excused. While theoretically such jurors might have nonetheless been able to determine guilt or innocence, their feelings were such so as to interfere with their duty to act impartially, as required by the Federal Constitution, and if such jurors were allowed to sit, their partiality toward the penalty to be imposed would in most cases preclude any verdict and would grant the defendant practical immunity. [*People* v. *Hobbs,* 35 Ill. 2d 263, 271, 272, 220 N.E. 2d 469 (1966), *cert. den.,* 386 U.S. 1024, 87 S. Ct. 1381, 18 L. ed. 463 (1967)] It is no answer to say that a two-stage trial would have been a better procedure, since, as Justice Cardozo once remarked, a state's criminal procedure does not run afoul of the Fourteenth Amendment because another method may seem fairer or wiser. [*Snyder* v. *Massachusetts,* 291 U.S. 97, 105 (1934)]. Separate verdicts dealing with guilt or punishment are foreign to Illinois Practice [*People* v. *Bernette,* 30 Ill. 2d 359 (1964)], and two part jury trials have never been compelled by this Court as a matter of constitutional law. [*Spencer* v. *Texas,* 385 U.S. 554, 568, 87 S. Ct. 648, 656 (1967)].

In regard to the second contention, the argument is made that a juror can follow the law even though he has scruples against imposition of the death penalty, because

the law merely provides that he should exercise his discretion as to the penalty. No matter how this argument is phrased, the simple fact is that it requires that the Constitution be interpreted as giving an accused the right to trial by a "slightly biased" jury rather than an "impartial" jury. This argument is of course contrary to a legion of cases holding that a juror must be indifferent between the parties [See, *e.g.*, *Hayes* v. *Missouri*, 120 U.S. 68, 70 (1887)], and, furthermore, it is also contrary to good reason. If this argument is sustained, then the State similarly has a right to a jury composed of individuals who believe that the death penalty should be imposed in the case being tried. This is not merely a theoretical or hypothetical situation, since at least one prospective juror in a recent Illinois prosecution—where the defendant was charged with methodically slaughtering eight nurses—stated on *voir dire* that he would not consider anything other than the death penalty if the defendant's guilt were proven. The law however is to the contrary, and the courts have always held that such individuals should be excused for cause. [*Stroud* v. *United States*, 251 U.S. 15, 20, 21 (1919); *United States* v. *Puff*, 211 F. 2d 171, 182 (2d Cir. 1954)]. In any civil rights prosecution in the South, the defendant would have a right to jurors who believed that no white man should get more than a twenty-year sentence for killing a Negro. A defendant in a dry State, who is being prosecuted for violation of liquor laws, would be entitled to jurors who believed that a person should be fined but not imprisoned for such violations. Such consequences, and many more, would naturally follow if the argument of *amicus curiae* is accepted, and the People do not believe that such a unique interpretation of our Constitution is warranted.

In regard to the third contention, it is argued that the exclusion of death-scrupled jurors deprives the defendant of a fair trial on guilt or innocence, and that defendant's right to impartiality on guilt or innocence must be paramount to the State's right to an impartial trial on the issue of punishment. This argument will now be considered.

C.

Petitioner has failed to demonstrate that the exclusion of scrupled jurors deprived him of a fair trial on the question of guilt or innocence.

Before examining the so-called proof that petitioner was deprived of a fair and impartial trial on the question of guilt, let us examine the circumstances under which this claim is made When the scrupled jurors were questioned, no attempt was made by defense counsel to show that they were nonetheless competent jurors. When the scrupled jurors were excused, no claim was made that such exclusion deprived Witherspoon of a fair trial on the question of guilt or innocence. When the jurors finally were accepted by defense counsel, the defense still had three peremptory challenges left to exercise. (This latter fact in and of itself has often been taken as a convincing indication that the jurors who were impanelled were impartial. See cases collected in *United States* v. *Puff*, 211 F. 2d 171, 185 (2d Cir. 1954)). The jurors finally accepted by defense counsel said that they could be fair and impartial, and such an assurance should not lightly be discarded. [*Rideau* v. *Louisiana*, 373 U.S. 723, 733 (1963) (Dissenting opinion)]. This exact claim, that exclusion of scrupled jurors deprived defendant of a fair trial, was not specifically raised until six years after the trial had concluded. Even then,

petitioner's counsel considered the claim a "legal issue", and he stated that no hearing was required. (R. Vol. IV, p. 0210) In most cases involving claims of due process deprivations, this Court has required a showing of identifiable prejudice to the accused, and it is only where a procedure employed by a State involves such a probability that prejudice would result that no showing of harm is required. [*Estes* v. *Texas,* 381 U.S. 532, 542 (1965)]. The circumstances of this case indicate that there was no such great probability of prejudice, and the People submit that the accused must make a clear showing of prejudice.* Let us now examine the contentions relied upon to establish that petitioner was deprived of a fair trial.

The petitioner, and those *amicus curiae* supporting his position, rely on two arguments to sustain the proposition that he was deprived of a fair trial. First, it is argued as a matter of logic that non-scrupled jurors must necessarily be partial to the prosecution. Secondly, it is argued that various studies show that non-scrupled jurors are "prosecution prone" and therefore unable to give a defendant a fair trial. In regard to the first argument, the fallacy of petitioner's logic is most eloquently exposed in the case of *Turberville* v. *United States:*

> ". . . No proof is available, so far as we know, and we can imagine none, to indicate that, generally speaking, persons not opposed to capital punishment are

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* The People are fully aware of cases such as *Ballard* v. *United States,* 329 U.S. 187 (1946), and similar cases holding that no showing of prejudice need be shown in an individual case where there has been a systematic and arbitrary exclusion of an eligible class from jury duty. However, the People will point out in the next argument that there was no such arbitrary exclusion of an eligible class.

so bent in their hostility to criminals as to be incapable of rendering impartial verdicts on the law and the evidence in a capital case. Being not opposed to capital punishment is not synonymous with favoring it. Individuals may indeed be so prejudiced in respect to serious crimes that they cannot be impartial arbiters, but that extreme is not indicated by mere lack of opposition to capital punishment. The two antipathies can readily coexist; contrariwise either can exist without the other; and indeed, neither may exist in a person. It seems clear enough to us that a person or a group of persons may not be opposed to capital punishment and at the same time may have no particular bias against any one criminal or, indeed, against criminals as a class; people, it seems to us, may be completely without a controlling conviction one way or the other on either subject.. . . ." [303 F. 2d 411, 420, 421 (D.C. Cir. 1962), *cert. den.*, 370 U.S. 946 (1962).]

Let us now examine the four studies relied upon to establish that the defendant was deprived of a fair trial on the question of guilt or innocence. The first two studies, one by Cody Wilson and the other by Faye Goldberg, were based on questionnaires distributed to college students. Both of these studies were based on rather small samplings (187 students in the first study, and 200 students in the second) and apparently none of these students had ever served as jurors. The validity of such studies, based on college students, is perhaps most aptly described in another of the studies relied upon: "Actual juries are markedly heterogenous. Generalizing from college students to jury members is hazardous." (*An Investigation into Certain Personality Variables Among Capital Trial Jurors* by Robert Crosson, p. 25) Two of the five conclusions reached by Dr. Wilson, as to differences between scrupled jurors and non-scrupled jurors, did not reach

significance. (Brief of NAACP Legal Defense and Educational Fund, pp. 57, 58) Apparently neither of these studies gave any consideration to the ethnic backgrounds of the students, and the study of Dr. Hans Zeisel (also relied upon to support petitioner's argument) found that persons of various ethnic backgrounds differed vastly as to degrees of "proneness". And of course neither of these two studies were related to objectivity or impartiality in any way. Any study which compares one group of individuals having any common bias which would favor a defendant, with another group which stands indifferent on the same subject, will undoubtedly find that the latter group would be considered, relatively, more favorable to the prosecution. The Wilson and Goldberg studies merely show that scrupled jurors might perhaps convict less often than impartial jurors, but no defendant has the right to escape existing procedures on the ground that some other way will give him a beter chance of acquittal. [*Fay* v. *New York*, 332 U.S. 261, 285 (1947)]

The third study was a doctoral thesis by Robert Crosson, and it is set forth in part in Appendix D to this Brief. When one considers the attitude with which this study was undertaken, the results are most significant. Mr. Crosson begins his dissertation by commenting that the death penalty is barbaric, and then he discusses an article by Walter Oberer (39 Tex. L. Rev. 545 (1961)) stating an opinion that a defendant is deprived of a fair trial on guilt or innocence by the disqualification of scrupled jurors. Crosson then in effect sets out to support Oberer's argument by attempting to prove that death-qualified jurors are more dogmatic, more opinionated, more conservative, more manifestly hostile, and less critical in thinking than scrupled jurors. In spite of his attitude and approach, Crosson was able to prove only that death-qualified jurors

are more conservative than scrupled jurors, and in fact his studies indicated that scrupled jurors were slightly more opinionated than non-scrupled jurors.

The fourth study relied upon is a yet unfinished work by Hans Zeisel, entitled "Some Insights Into the Operation of Criminal Juries." It finds that scrupled jurors are "somewhat defense-prone" and that non-scrupled jurors are "somewhat prosecution-prone", in about the same degrees.

It should be noted that none of these four studies was offered into evidence, and defense counsel expressly stated to the trial court, at the post-conviction hearing, that the question presented herein was a legal issue and that no evidence was necessary. (R. Vol. IV, p. 0210) None of these studies takes into consideration that a jury verdict is a group verdict, and the People submit that these studies fail to show as a matter of "demonstrable reality" that the defendant was deprived of his right to a fair trial on the question of guilt or innocence. [*Darcy* v. *Handy,* 351 U.S. 454, 462 (1956)] Furthermore, such studies cannot and should not replace the traditional ways of determining whether a juror can be impartial in any given case.

The traditional way of making such a determination has been by *voir dire* examination, where the defense and the prosecution are able to face each juror and reach a judgment as to his or her ability to render an impartial judgment. Both the defense and the prosecution are allowed challenges for cause, and in addition either may summarily excuse a juror, on mere suspicion that he would be biased in some way. Of couse these procedures have always been subject to review by the higher courts, which will reverse where the Record clearly shows that the trial court abused

his discretion in either excusing a juror or refusing to excuse a juror. Such has all transpired in this case, and until six years after the trial concluded there was no hint that defendant was tried by an unfair jury. Now eight years after the trial has concluded, and in spite of a record devoid of any evidence that the jurors were partial in any way, the petitioner would rely on four sociological and psychological studies to prove that he was deprived of his constitutional rights. If such studies are accepted to determine what constitutes an impartial juror, rather ludicrous situations might arise in the future. For example, if a white, affluent, suburban dweller takes the stand and states that he can be a fair and impartial juror, is he to be disqualified nonetheless because the statistics show that such individuals are "prosecution-prone"? If such studies are accepted, the defense would be entitled to challenge for cause any juror who is British, no matter what he states about his ability to be impartial, because such individuals were found by the Zeisel study to be the most "prosecution-prone." The prosecution, on the other hand, should be able to automatically exclude any Italian, since members of that nationality are the most "defense prone." Such results would be contrary to our sense of orderly justice and right reason. The determination of whether or not jurors are "impartial" is peculiarly within the province of the courts, not the scientist, and these matters should be left to the bodies to which they have been traditionally entrusted. It is perhaps worthwhile to note in this connection that the use of scientific principles in legal controversies sometimes compels a different result than if constitutional principles are utilized. An illustration of this is that a mathematician, who examined two decided cases—one where this Court held that there was no intentional exclusion of Negroes from jury duty. [*Swain* v. *Alabama*, 380

U.S. 202 (1965)], and another where this Court denied certiorari after a State court had similarly held there was no intentional exclusion—has concluded that if the empirical science of mathematics had been applied to those cases, the conclusion would have followed that discrimination had in fact been practiced [Finkelstein, "The Application of Statistical Decision Theory to the Jury Discrimination Cases," 80 Harv. L. Rev. 338 (1966)] In summary, though, it is the Court, not the scientist, which has been entrusted with the responsibility of making determinations as to whether or not a trial has in fact been fair, and under all the standards enunciated by this Court, the defendant has been given a fair trial by twelve impartial jurors.

II.

THE OPERATION OF THE ILLINOIS STATUTE DID NOT UNCONSTITUTIONALLY DEPRIVE PETITIONER OF A "REPRESENTATIVE" JURY, SINCE THERE WAS NO ARBITRARY EXCLUSION OF AN IDENTIFIABLE GROUP, AND SINCE THE FEDERAL CONSTITUTION DOES NOT REQUIRE THAT INDIVIDUALS WHO ARE BIASED IN FAVOR OF A DEFENDANT'S POSITION BE INCLUDED ON A JURY.

While this Court has said a jury must be taken from a cross section of the community, it has generally expressed that thought as *rationale* for the principle that it is unconstitutional for a state to systematically and arbitrarily exclude an identifiable group of persons who are otherwise qualified to be jurors. [See *Swain v. Alabama,* 380 U.S. 202, 228-230 (1965), where the dissenting opinion reviews most of the cases and points out the rationale for the de-

cisions] Thus in *Ballard* v. *United States* [329 U.S. 187 (1946)] there was a deliberate and systematic exclusion of all women; in *Hernandez* v. *Texas,* [347 U.S. 475 (1954)] a deliberate and systematic exclusion of all Mexicans; in *Thiel* v. *So. Pacific Co.* [328 U.S. 217 (1946)] a deliberate and systematic exclusion of daily wage earners; and in *Smith* v. *Texas* [311 U.S. 128 (1940)], *Strauder* v. *West Virginia,* [100 U.S. 303 (1879)] and many other similar cases, a deliberate and systematic exclusion of Negroes from the venires. However, it is not every exclusion that violates the Federal Constitution, but only those exclusions which are arbitrary or based on an unreasonable classification of an identifiable group. [See *Hoyt* v. *Florida,* 368 U.S. 57, 59, 60 (1961)]. Thus a State may prescribe juror qualifications, such as minimum educational requirements [*Strauder* v. *West Virginia,* 100 U.S. 303 (1879); *Gibson* v. *Mississippi,* 162 U.S. 565 (1896)], and it may exempt certain classes such as lawyers and doctors for the good of the community. [*Rawlins* v. *Georgia,* 201 U.S. 638 (1906); *Labat* v. *Bennett,* 365 F. 2d 698, 720 (5th Cir. 1966), *cert. den.,* 386 U.S. 991 (1967)]. The federal law itself provides that convicted and unpardoned felons, minors under 21 years of age, and those who have not resided within the judicial district for one year, are not qualified to serve as federal jurors. [28 U.S.C. § 1861]. Members of the armed forces, policemen and firemen, and public officers are expressly exempt from jury service. [28 U.S.C. § 1862]. Furthermore, a group of persons may be excluded for the public interest upon a finding of the district judge that there would otherwise be an obstruction or delay in the fair and impartial administration of justice. Each of the states has also provided similar qualifications and exemptions. The point of this is that a mere intentional exclusion of certain individuals does not in and of

itself violate the Federal Constitution; it is only when there is no reasonable explanation for such an exclusion, and only when the unreasonable action is directed at an identifiable group, that the Constitution is offended. The People submit that in the case at bar there was neither an arbitrary exclusion, nor was there an identifiable group excluded. We will first consider whether there was an arbitrary exclusion.

As was noted earlier, each of the jurors excused, by his admission of "scruples", had indicated a belief so strong as to preclude him from standing impartially as to both the government and the defense. If exclusion of such individuals violates the Constitution, then many other widespread and common criminal trial practices must fall in the future before similar challenges. For example, it would then also be arbitrary to excuse those who would consider nothing less than the death penalty. As to civil rights prosecutions in Southern states, it would be arbitrary to exclude those jurors believing in only minimum punishment for the offense charged. In short, in any case where the prospective jurors might be hesitant to impose an allowable penalty (such as in abortion prosecutions, liquor law prosecutions, gambling prosecutions, and income tax evasion prosecutions), it would be unconstitutional (according to petitioner's theory) to exclude even those individuals who stated on *voir dire* examination that they would impose no imprisonment or would not consider any sentence greater than the minimum prescribed by law. Such a holding is not warranted by either the Record or the law. Even in the new Jury Selection Act (Public Law 90—90th Congress, S. 989, reported in 2 Crl. 3161) which makes an attempt to broaden the group eligible for jury service in the federal courts, it is expressly pro-

vided that persons who may be unable to render impartial jury service may be excluded. The fact that defense counsel never made any objection to such exclusion, and the fact that this specific claim was not raised until six years after petitioner's conviction, is in and of itself, the People feel, a recognition that no arbitrary or unreasonable action was involved. During all this period of time, the petitioner has been represented by capable and experienced counsel, and certainly if any action by the trial court hinted of unreasonableness, the matter would have been presented to one of the numerous courts which have considered petitioner's claims. In summary, there is no arbitrary exclusion shown in this case.

Nor was there an exclusion of an identifiable group, since the only thing that the excused jurors had in common was a common prejudice which would have benefitted the defendant had they been allowed to serve. It is argued in effect that scrupled jurors are an identifiable group, because statistics show that females, Democrats and persons from the lower income groups will be excluded, while white, male, wealthy suburban dwellers would remain. This case demonstrates the fallacy of attempting to make constitutional arguments from general statistics; since the Record demonstrates that what is foretold did not in fact occur. While we cannot determine the race and politics of the various jurors, we can note that out of 29 identified jurors who were excused for scruples, more than half were men. (People's Appendix A); the statistics would indicate that the opposite would be true. We can also examine the final composition of the jury to determine if it was made up of ultra-conservative, affluent suburban dwellers that supposedly remain (according to the statistics and the Petitioner's arguments) after the scrupled jur-

ors are excused. The jurors chosen and a brief summary of their backgrounds is as follows:

1) Mrs. Blanche Carlson:

She lives in Chicago with her husband, and she works as a machine operator at Glaser Crandell Co. (R. 706)

She has three brothers who are employed as a truck driver, a stockclerk and a riveter. (R. 707)

Her father is dead, but he worked for the city, prior to his death, cleaning alleys. (R. 707, 708)

2) Mrs. Cecelia Lohmeier:

She has lived in Chicago for 14 years (R. 724), and prior to that she lived in Oshkosh, Wisconsin. (R. 726) She lives with her husband, who has been a Chicago Transit Authority driver for 15 years, and she works part time for a pastry shop. (R. 725)

3) Miss Victoria Blaha:

She has lived in Chicago all her life. (R. 747) She has worked for the past 34 years in the claims department of Travelers Insurance Company. (R. 748)

4) William Beuke:

He is a professional photographer for People's Gas, Light and Coke Company for the past 24 years (R. 753), and he lives at a Chicago address. (R. 753, 754)

5) Ernest Sparrow:

He lives at a Chicago address, and he has been an advertising promotion assistant for Libby, McNeil & Libby for a number of years. (R. 773)

6) Mrs. Alma Ruff:

She has lived in Chicago all her life. (R. 809) She has worked at the International Chemical Company in the printing office on a machine for 41 years. (R. 809, 810) Her husband was an electrician. (R. 811)

7) Fred Racine:

He has lived at a Cicero, Illinois, address for the past 14 years, and he has worked for Western Electric for almost 25 years as a tool and die maker. (R. 890)

8) Albert Klein:

He went to school in Chicago, but has resided in Elmwood Park, Illinois, for the past 6 years. (R. 905, 906) He has been a plant engineer for Apex Bolt Company for the past 13 years. His job is to "trouble shoot" and to correct faults and deficiencies in the machinery. His wife has been a part-time office worker for the YMCA for the past 5 years. (R. 906, 907)

9) John Hayes:

He lives in Oak Lawn, Illinois, and he works as a printing superintendent at Corn Products Company. (R. 946, 947)

10) Paul Grady:

He has lived in Maywood for the past 17 years (R. 962), and he has been a salesman in Chicago for the past 24 years. (R. 962, 963)

11) Wat Cluverius:

He lives at a Chicago address (R. 1006), and he has worked at a paper company for 14 years and is presently a manager. (R. 1007)

12) Ned Calderone:

He lives in Bellwood, Illinois, and has been a mechanic for Commonwealth Edison for the past 14 years. (R. 1022)

Getting back and summarizing, however, the purpose of this particular argument is to show that there was no arbitrary exclusion of any identifiable group of qualified jurors, and to show further that the cases dealing with deliberate exclusion are not applicable. It is perhaps appropriate to note that there were policy considerations present in those "deliberate exclusion" cases which are not present here. In most of those cases the facts were that a group of individuals, who were generally qualified to serve as jurors, were excluded prior to the time that they ever appeared for jury duty by the arbitrary action of jury commissioners. Such situations—where a state official is able by his actions to arbitrarily prescribe who shall or shall not appear for jury duty, without any regard to the qualifications of those excluded—present grave possibilities of abuse. Such possibilities of abuse are not presented by the Illinois practice of excluding scrupled individuals from jury duty. In such cases all qualified individuals are called for service without regard to their scruples or lack thereof, and they are excused only after they indicate on *voir dire* examination an inability to render a fair and impartial verdict. Such *voir dire* examination goes on in the defendant's presence, and at any time he can attempt to show that the juror's feelings are not strong enough to preclude the juror from render-

ing a fair verdict. The defendant further can object that the exclusion of any one individual is not warranted and will deprive him of a fair trial, and he can exercise peremptory challenges to excuse anyone that he even suspects of bias. All of these courses of action were available to the defendant in this case, and the facts of the case do not warrant application of the principles enunciated in cases where this Court found an arbitrary exclusion of qualified individuals.

Although the cases previously discussed do not apply, the petitioner has seized upon the *rationale* of those cases and has argued that he is entitled to a "representative" jury. He further argues that those having scruples against the death penalty are a large portion of the community, and that exclusion of those persons denies him of this "cross section" jury. This theory is not supported by any previous decision of this Court, since this Court has disclaimed the necessity of proportionate representation as an end in itself. [See cases discussed in *United States* v. *Dennis,* 183 F. 2d 201 (2nd Cir. 1950) (Judge Learned Hand), *affirmed,* 341 U.S. 494]. Even in the cases relied upon by the petitioner to support this argument, this Court has expressly said that any one jury need not be representative of all groups or be a perfect mirror of the community. [*Thiel* v. *So. Pacific Co.,* 328 U.S. 217 (1946); *Swain* v. *Alabama,* 380 U.S. 202, 208 (1965)]. The argument made on petitioner's behalf—that death scrupled jurors are more compassionate and therefore must be present on the jury to insure defendant a fair trial—is very similar to the contention made and rejected in *Hoyt* v. *Florida,* 368 U.S. 57 (1961). In *Hoyt* a woman defendant, convicted of murder, argued that the presence of woman jurors was essential to guarantee her a fair trial, because woman jur-

ors would have been more understanding and compassionate than men in assessing her act and her defense of temporary insanity. In holding that there had been violation of the Fourteenth Amendment, this Court commented on the defendant's argument:

> "these premises misconstrue the scope of the right to an impartially selected jury assured by the Fourteenth Amendment. That right does not entitle one accused of crime to a jury tailored to the circumstances of the particular case, whether relating to the sex or other condition of the defendant, or to the nature of the charges to be tried. It requires only that the jury be indiscriminately drawn from among those eligible in the community for jury service, untrammelled by any arbitrary and systematic exclusion." (368 U.S. at 59)

From these cases it is apparent that petitioners claim to a "representative" jury is without support in the law, and it is similarly without support in logic.

The traditional and century old concept of an "impartial jury", which is capable of rendering a true verdict on the law and the evidence, is the foundation of other basic principles of American jurisprudence. One such principle—which is accepted and followed in the great majority of, if not all, states—is that the verdict in a criminal case must be unanimous. In *Andres* v. *United States* [333 U.S. 740 (1948)], where this Court said that a jury's verdict must be unanimous both as to guilt and as to punishment in a murder prosecution, this Court said that such a construction of the federal statute involved was more consonant with the "history of the Anglo-American jury system." (333 U.S. at 749). If the notion of an "impartial" jury is to be replaced by that of a "representative" jury, then principles such as unanimity of verdict must also be re-evaluated. The only other alternative is a serious disrup-

tion of all state criminal trials. A "representative" jury as envisaged by the petitioner would be a partisan jury, which would in almost all cases work to a defendant's advantage and would almost always preclude any conviction. For example, if petitioner were charged with civil rights violations arising from the murder of civil rights workers, and if he were being tried in a Southern state before a "representative" jury, the People suggest that he would never be convicted.

Furthermore, if the traditional concept of an "impartial" jury—which has the gloss of judicial interpretation and which is generally understood—is to be replaced with the concept of a "representative" or "cross-section" jury, a trial which might be constitutional when tried might not be constitutional when it is reviewed by this Court. The statistics in regard to those favoring or opposing the death penalty provides an illustration. In 1936 sixty-two percent of the population favored the death penalty as opposed to thirty-three per cent against it. In 1953 those favoring the death penalty had risen to sixty-eight per cent of the population, as opposed to twenty-five per cent. In 1960, at the very time when petitioner was convicted of murdering the policeman, fifty-one per cent were in favor of capital punishment for murder and thirty-six per cent were opposed. While a little less than fifty per cent of the prospective jurors in this case were excused for having religious or conscientious scruples, only one hundred and two prospective jurors out of six hundred and nine were excused for the same cause in a recent and notorious prosecution in Illinois.* In the Arizona pros-

* This was the case of *People v. Speck*, 67-y-20-27, Circuit Court, Peoria County, where the defendant was convicted of killing 8 nurses. The figures as to jurors excused were supplied by the trial judge.

ecution against Rebecca Madden (who has been granted leave to file an amicus curiae brief), only eleven potential jurors out of a total panel of fifty-three were eliminated because of their objection to the death penalty. (Brief of Rebecca Madden, p. 4). In the companion case of *Bumpers* v. *North Carolina,* sixteen out of fifty-three were similarly excluded. (Brief of NAACP Legal Defense and Education Fund, p. 5).*

The point of all this is, first, that the idea of a "representative" jury is a totally unworkable concept, and secondly, that constitutional "fairness" would be determined by public opinion polls if such a concept were adopted. This idea that a prejudice is entitled to be represented on the jury when it is prevalent enough is a dangerous concept, contrary to our idea of equal justice for the unpopular defendant as well as the popular one. The People submit that no such a radical change in our law is warranted by this case.

In summary, the federal constitution requires only that jurors be drawn indiscriminately from those eligible in the community for jury service, untrammelled by any arbitrary exclusions. The jurors in the case at bar were, in fact, drawn indiscriminately from those eligible in the community, and the exclusion of those who were unable to render an impartial verdict was not arbitrary in any way. The so-called right espoused by the petitioner of a

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* Such a discrepancy between the percent of those excused in a case, as opposed to the percentage of the population opposing the death penalty, suggests two things: first, that although a large portion of the population may at this time be generally opposed to capital punishment, some of these individuals do not have such scruples as would disqualify them from jury duty; secondly, that the numbers fluctuate in any community as a result of some particular crime.

"representative" or "cross-section" jury finds no support in either law or logic.

CONCLUSION

One of the most basic and traditional concepts in American Law has been the idea of trial by an "impartial jury". Since the early days of our Country, both federal and state courts have furthered this concept by excluding all individuals who were so biased that they could not render a verdict on the law and the evidence, whether that bias was for the government or for the defendant. In the case at bar, this tradition was carried on by excluding those individuals whose bias as to the death penalty prevented them from imposing it under any conditions. The exclusion of such scrupled individuals was a reasonable one, supported by statutory or case law of forty-four jurisdictions and there was no arbitrary action such as would violate the federal constitution. The petitioner failed to show that he was deprived of a fair trial on the question of guilt or innocence by the procedures followed, and the record showed, rather, that his guilt was determined by twelve impartial and representative jurors. For these reasons, the People of the State of Illinois ask that the decision of the Illinois Supreme Court be affirmed.

Respectfully submitted,

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APPENDIX A.

VOIR DIRE EXAMINATION

No.	Name	Examination Begins at	Excused in Record at	Excused by Court upon motion of	Reason for Excuse
1)	Clifford Salazar	636	644	State	Scruples
2)	Joe Sanders	645	674	Defendant	Peremptory
3)	Carrie B. McCray	651	667	State	Peremptory
4)	Ruth Anna O'Reilly	655	675	Defendant	Peremptory
5)	Bertha Pritchard	660	661	State	Scruples
6)	Peter F. Cosenza	661	662	State	Scruples
7)	John M. Kriz	662	674	Defendant	Peremptory
8)	Violet C. Layman	667	668	Court	Scruples
9)	Victoria Hetzel	668	675	Defendant	Peremptory
10)	Helen Heimann	675	728	State	Peremptory
11)	Casimir A. Mlyniec	682	685	State	Scruples
12)	Oleh Kuritza	685	686	State	Scruples
13)	Genevieve Wisniewski	686	687	State	Scruples

No.	Name	Examination Begins at	Excused in Record at	Excused by Court upon motion of	Reason for Excuse
14)	Marie Stella	687	697	Defendant	Peremptory
15)	Julia Darcy	697	715	State	Scruples
16)	Erna Formanek	701	728	State	Peremptory
17)	Blanche Carlson	705		Accepted as Juror	
18)	Mary Scolaro	723-A	724	State	Scruples
19)	Cecelia Lohmeier	724		Accepted as Juror	
20)	Beatrice Duncan	729	729	State	Scruples
21)	John Boortz	730	730	State	Scruples
22)	Vito Matthew Calamia	734	752	State	Peremptory
23)	Lloyd Bohl	739	739	State	Scruples
24)	Victoria Blaha	739		Accepted as Juror	
25)	John Ahlert	742	743	State	Scruples
26)	Dorothy Andrews	742	743	State	Scruples
27)	Edward Barmann	742	743	State	Scruples
28)	Carmelia Alisauskas	742	743	State	Scruples
29)	Austin Hart	742	743	State	Scruples
30)	James Wilson	742	744	State	Scruples
31)	Viola Awe	744	744	State	Scruples

No.	Name	Examination Begins at	Excused in Record at	Excused by Court upon motion of	Reason for Excuse
32)	Prospective Juror 213	744	745	Court	Scruples
33)	Prospective Juror 243	752	752	Court	Scruples
34)	William Beuke	752		Accepted as Juror	
35)	Kenneth Stuebe	764	798	Defendant	Peremptory
36)	Ernest Sparrow	764		Accepted as Juror	
37)	John Biesiada	777	788	State	Peremptory
38)	Herbert Krumwiede	783	806	Defendant	Peremptory
39)	Prospective Juror 159	788	788	State	Scruples
40)	Hazel Sedivy	789	823-A	State	Peremptory
41)	Myrtle Sowell	803	806	Defendant	Peremptory
42)	Prospective Juror 140	806	806	Court	Scruples
43)	Prospective Juror 137	807	807	Court	Scruples
44)	Prospective Juror 131	807	807	Court	Scruples
45)	Alma Ruff	808		Accepted as Juror	
46)	Patricia Schricker	811	856	State	Peremptory
47)	Prospective Juror 129	823-A	823-A	Court	Scruples
48)	Prospective Juror 188	823-A	824	Court	Scruples
49)	Prospective Juror 114	823-A	824	Court	Scruples

No.	Name	Examination Begins at	Excused in Record at	Excused by Court upon motion of	Reason for Excuse
50)	Richard Oesterlin	824	830	Defendant	Peremptory
51)	Prospective Juror 66	830	830	Court	Scruples
52)	Rose Mascia	831	841	State	Peremptory
53)	Prospective Juror 33	841	841	Court	Scruples
54)	Prospective Juror 14	841	842	Court	Scruples
55)	Prospective Juror 9	842	842	Court	Scruples
56)	Prospective Juror 241	848	848	Court	Scruples
57)	Aletha Kreis	850	867	Defendant	Peremptory
58)	Prospective Juror 226	856	857	Court	Scruples
59)	Prospective Juror 223	857	857	Court	Scruples
60)	Etta Burda	858	877	Defendant	Peremptory
61)	Prospective Juror 187	868	868	Court	Scruples
62)	Prospective Juror 169	868	868	Court	Scruples
63)	Lorraine Wozniak	869	889	State	Peremptory
64)	Prospective Juror 161	877	877	Court	Scruples
65)	Prospective Juror 160	877	877	Court	Scruples
66)	John Tolan	878	892	Defendant	Peremptory
67)	Fred Racine	890		Accepted as Juror	

No.	Name	Examination Begins at	Excused in Record at	Excused by Court upon motion of	Reason for Excuse
68)	Prospective Juror 143	892	892	Court	Scruples
69)	Prospective Juror 119	893	893	Court	Scruples
70)	Esther Pass	896	899	State.	Peremptory
71)	Paul G. Ongena	900	904	Defendant	Cause
72)	Albert Klein	904		Accepted as Juror	
73)	Frank Morrison	913	944	Defendant	Peremptory
74)	Nancy Kenney	916	944	Defendant	Peremptory
75)	Rachel McKee	920	924	State	Peremptory
76)	Harold E. Klapp	922	944	Defendant	Peremptory
77)	Catherine Johnson	924	928, 929	Court	Couldn't be fair and impartial, but no reason given
78)	Helen Jedinak	929	932	State	Cause
79)	Sylvia Hybiak	933	937	State	Peremptory
80)	Richard Holzhausser	937	944	Defendant	Peremptory
81)	Prospective Juror 86	944	944	Court	Scruples

No.	Name	Examination Begins at	Excused in Record at	Excused by Court upon motion of	Reason for Excuse
82)	John Hayes	946		Accepted as Juror	
83)	Herbert Gross, Jr.	952	990	State	Peremptory
84)	Lionel Greco	957	966	State	Peremptory
85)	Paul Grady	962		Accepted as Juror	
86)	Agnes Giles	967	969	Defendant	Cause
87)	Carl Gehrke	969	1017	State	Peremptory
88)	Prospective Juror 70	990	991	Court	Scruples
89)	Marie Flanagan	991	998	State	Peremptory
90)	Harry Fiset	999	1005	Defendant	Peremptory
91)	Prospective Juror 63	1005	1006	Court	Scruples
92)	Wat T. Cluverius	1006		Accepted as Juror	
93)	Prospective Juror 46	1017	1017	Court	Scruples
94)	Prospective Juror 40	1018	1018	Court	Scruples
95)	Ned Calderone	1020		Accepted as Juror	

Totals

95 prospective jurors examined.

46 jurors excused for cause because of religious or conscientious scruples.

12 jurors accepted (4 women, 8 men).

17 jurors excused by peremptory challenges by defendant.

16 jurors excused by peremptory challenges by prosecution.

2 jurors excused for cause by defendant.

1 juror excused for cause by prosecution.

1 juror by court on its own motion when she stated she couldn't be fair and impartial.

APPENDIX B.

EXCERPTS FROM PUBLIC OPINION POLLS ON CAPITAL PUNISHMENT

Gallup Public Opinion News Service (Dated March 22, 1960)

The case of Caryl Chessman, the convicted kidnapper sentenced to die May 2, has renewed a worldwide debate: should capital punishment be abolished?.

The latest Gallup Poll survey finds 51 per cent of the American public is in favor of the death penalty for persons convicted of murder.

This marks a sharp drop from a previous measurement in November, 1953, which showed 68 per cent approving capital punishment for murder.

In April, 1936, when the Gallup Poll first sought the opinion of the American public on this issue, it was found that 62 per cent believed persons convicted of murder should be sentenced to death.

Across the nation, Gallup Poll reporters in the latest survey sought to determine how typical citizens line up today on the issue of capital punishment for murder.

Here is the question asked of people in all walks of life:

"Are you in favor of the death penalty for persons convicted of murder?"

Following are the results of the latest survey, compared with findings from the surveys in 1953 and 1936:

Favor Death Penalty for Murder?

	Today	1953	1936
Yes	51%	68%	62%
No	36	25	33
Undecided	13	7	5

Gallup Public Opinion News Service
(Dated March 24, 1960)

A marked decline in the number of people who favor the death penalty for murder has been found in both the U. S. and Canada.

Surveys taken in the two countries at seven-year intervals show a remarkably similar trend. In the latest U. S. Gallup Poll, 51 per cent of the general public is shown to favor capital punishment; in 1953, the figure was 68 per cent.

In Canada, the Gallup Poll finds the same slim majority, or 51 per cent, approving of the death penalty today. The 1953 measurement there showed 71 per cent.

The following table illustrates the similarity of opinion in the two countries:

Favor Death Penalty for Murder

U. S.

	Today	1953
Yes	51%	68%
No	36	25
Undecided	13	7

Canada

	Today	1953
Yes	51%	71%
No	41	22
Undecided	8	7

APPENDIX C.

EXCERPTS FROM VOIR DIRE EXAMINATION

900 *Paul G. Ongena*

* * * * *

MR. KISSANE: Q. Have you ever appeared as a witness or a party in any type of a legal proceeding?

901 A. No, sir.

Q. Have you ever served as a juror before?

A. No, sir.

Q. Having in mind the questions asked of all the preceding jurors, did anything come to your mind that indicated to you you cannot be a fair and impartial juror?

A. Just one thing here. My brother's son-in-law is a policeman.

THE COURT: Well, the question is: Does that—

MR. KISSANE: Q. Would that make you a fair and impartial juror?

A. I don't think it would affect me, no, sir.

Q. Sometimes we have people sitting there who, for some reason or other, there is something in their life that we could never think of, in asking questions, that would affect their service here and that's why we ask that general question.

902 A. I don't believe so.

* * * * *

Examination by Mr. Shelton.

903 Q. When, Mr. Ongena, even though a member of your immediate family is a police officer, you said, I believe, "I don't believe so," it would lead me to believe that there is just a little bit of reservation in that statement. Are you absolutely certain in your own mind you could be fair?

A. I'm not certain.

MR. SHELTON: Cause, your Honor.

THE COURT: Q. You feel that it might influence your verdict?

A. It might.

THE COURT: I think you're right to volunteer that information. We want twelve men and women who are absolutely fair and impartial. If, from what you heard about the case so far, you feel that there's a chance you might be prejudiced one way or another, you won't be a fair juror.

All right, you may step aside. That's all.

MR. SHELTON: Thank you, Mr. Ongena.

(Prospective juror excused.)

929 *Helen Jedinak*

(Prospective Juror 97)

THE COURT: Do you have a religious or conscientious scruple against the infliction of the death penalty in a proper case?

PROSPECTIVE JUROR 97: Yes, I do.

THE COURT: You do?

PROSPECTIVE JUROR 97: Yes, I do.

THE COURT: You don't believe in the death penalty?

PROSPECTIVE JUROR 97: No. It's just that I wouldn't want to be responsible.

THE COURT: That isn't it. No. Maybe you don't like to be a juror at all, but, then, that's your duty as a citizen. Now, answer my question: Do you have a religious or conscientious scruple against the infliction of the death penalty in a proper case?

PROSPECTIVE JUROR 97: No, I haven't.

THE COURT: All right, take a seat.

HELEN JEDINAK, called as a prospective juror, being first duly sworn, was examined as follows:

Examination by Mr. Kissane.

930 Q. The lady who just came into the jury box. Your name, please?

A. Helen Jedinak.

* * * * *

Q. Well, as you sit there now, knowing your past experience in life, is there anything that indicates to
931 you you cannot be fair and impartial?

A. Not in my past experience, no.

Q. Is there something in your frame of mind that indicates to you you cannot be fair and impartial? Now's the time to tell us.

932 A. That's right, that's right. Right now my frame of mind.

Q. You feel you cannot be fair and impartial, is that correct?

A. That's right.

MR. KISSANE: I submit, Judge, she said she cannot be fair and impartial.

THE COURT: Challenge for cause?

MR. KISSANE: Yes, Judge.

APPENDIX D.

Excerpts from "An Investigation Into Certain Personality Variables Among Capital Trial Jurors." by Robert Francis Crosson, 1966.

I. STATEMENT OF THE PROBLEM

The Contention

In American law the death penalty is nearing extinction. Of the fifty states thirteen are without capital punishment now, but within a decade or two all or most will very likely have abolished it.. Even in those states retaining capital punishment the trend of reduced frequency of executions suggests "de facto", if not statutory abolition. The death penalty has been a matter of controversy for centuries and in America itself an abolition movement began almost at the moment of the nation's founding (Cahn, 1957). Official killing by the state has been defended and condemned on a variety of grounds: In the name of morality and religion, in appeals to men's intelligence, practical wisdom, and political judgment, in appeals to superstition, retribution, and economics. In what has been a slow abolition process the seeming barbarity of the penalty has been illuminated and emphasized by the great essays and studies which have appealed to the higher instincts of man (e.g., by Writers—Camus, 1956; Koestier, 1957; Beccaria, 1872; by concerned jurists—Cardozo, 1947; Frank, 1957; Frankfurter, 1956; and by social scientists—Sellin, 1962; Weihofen, 1955). A recent book which presents the arguments surrounding capital punishment, both pro and con is *The Death Penalty in America,* edited by

Bedau (1964). This book contains in addition to a compilation of articles contributed by many writers from different fields, an excellent bibliography on the subject. The barbarity of the penalty affronts the civilized sensibilities of increasing numbers of people. And occasionally the popular press joins the voices of abolition (see *Newsweek,* March 8, 1965, pp. 26, and *Nation,* March 15, 1965, pp. 266). However, some of the mechanics of the judicial process by which the death penalty is levied have not been subject to public scrutiny and in fact have even been neglected by students of law. An extremely important aspect of the process, namely the jury impaneling procedures in capital trials has been reviewed by a professor of law, Walter E. Oberer, writing in a recent issue of an opinion journal (1964) an abstract of a law journal article published earlier (1961). Oberer contends that capital juries, because of voir dire challenges for scruples against the death penalty, are composed of individuals whose attitudes are inimical to the defendant's case. He believes specifically that the capital jury is comprised of "authoritarian personalities" (Oberer, 1961, p. 552). It is this contention of selective personality patterns in the jury which gives the matter psychological importance and which prompted the present study. Based on the personality trait constellation described in the *Authoritarian Personality* (Adorno, et. al., 1950), Oberer views the capital jury as consisting of individuals having the following personality pattern: moralistic condemnation; extrapunitiveness; distrust-suspicion (people threatening, victimization, survival of the fittest idea, world as a jungle); hierarchical conception of human relations, non-love-seeking, exploitive-manipulative opportunism (Oberer, 1961, p. 565). If it can be shown that Oberer's opinion of authoritarian jury compo-

sition in capital trials has validity then his contentions seriously challenge the due process and fair trial guarantees in American jurisprudence and as provided in the Constitution of the United States.

Very little research has been done in the study of juries, jury processes, and jury membership. There is currently some considerable work being done at the University of Chicago Law School in an experimental jury project, some of the results of which have already been published and are reviewed in a later section. A search of the literature reveals that Strodtbeck and his associates are responsible for most of the studies of juries from a psychological standpoint and these mainly have social psychological focus, viz., group functioning and process (Strodtbeck, 1962), social status (Strodtbeck, James, and Hawkins, 1958), social dimensions (Strodtbeck, and Hook, 1962), sex role differentiation (Strodtbeck and Mann, 1956), status and competence in jury deliberations (James, 1959a), evaluation of testimony by jurors (James, 1960), and interaction and coalition developments in juries (Hawkins, 1960). These will be mentioned again in the literature review. Not a single study could be found which examined personality factors among jury members except for some indirect studies of juror competency (e.g., James, 1959a), a most disturbing circumstance in light of Oberer's remarks. The need for such a study is even more compelling when one studies Oberer's line of argument, for his critique develops out of an attack upon the "internal logic of capital trials." The urgency for examining capital jurors for possible selective and consistent personality traits which might render capital jurors less than impartial evolves from Oberer's reasoning. If the voir dire contains procedures which systematically bias the jury against a defendant whose very life depends on that

jury, then the voir dire should be modified to conform to the ideals of blind justice and impartial review. The fact that no social scientist has looked directly into personality factors among jurors is remarkable and disturbing in view of the vital importance of the judgments of such groups. The psychological relevance as well as the lethal urgency of the contention becomes apparent in the following line of argument.

• • •

Purpose

The purpose of the present study is to investigate the contentions as developed. This is an applied study, using psychological techniques and knowledge. It is not intended or designed as a theoretical work. If it is demonstrated that a segment of the citizenry antagonistic to any degree toward the defendant is consistently and systematically selected for capital jury service, then clearly the voir dire in capital cases should be re-analyzed with the view to restructuring the procedure consistent with fair trial ideals. If the contentions are not supported by research then the assumptions can be made that either, 1) the research design was not adequate or sensitive enough to measure the variables under question, or, 2) the American voir dire system has in fact been consistent with fair trial ideals.

The questions to be answered in this study can be framed as follows: Are capital jurors inclined to be more authoritarian than jurors excused from duty because of death scruples? Does the voir dire in capital cases tend to eliminate jurors most capable of evaluating verbal evidence and arguments? And does the willingness to impose the death penalty reflect a relatively higher level of manifest hostility?

• • •

The Hypotheses

The questions posed earlier can be rephrased to provide the hypotheses underlying this research. They are stated in null form.

H1 Death qualified jurors will not be as dogmatic as death scruples jurors.

H2 Death qualified jurors will not be as opinionated as death scruples jurors.

H3 Death qualified jurors will not be as conservative as death scruples jurors.

H4 Death qualified jurors will not be less critical in thinking than death scruples jurors.

H5 Death qualified jurors will not be as manifestly hostile as death scruples jurors.

• • •

In terms of the null hypotheses tested in this research the results and conclusions for the central focus of this investigation can be summed up as follows:

H1 Death qualified jurors will not be as dogmatic as death scruples jurors. (Rokeach Dogmatism Scale)

Conclusion: The difference between juror groups was not significant; therefore the null hypothesis cannot be rejected. The predicated direction of difference (DQ < DS in dogmatism) was observed, however.

H2 Death qualified jurors will not be as opinionated as death scruples jurors. (Rokeach Opinionation Scale)

Conclusion: No difference between juror groups was observed; therefore the null hypothesis cannot be rejected.

H3 Death qualified jurors will not be as conservative as death scruples jurors. (Rokeach Conservatism-Liberalism subscale)

Conclusion: The death qualified jurors were significantly more conservative than the death scruples jurors; therefore the null hypothesis is rejected.

H4 Death qualified jurors will not be less critical in thinking than death scruples jurors. (Watson-Glaser Critical Thinking Appraisal)

Conclusion: The death scruples jurors were not significantly less critical in thinking than the death scruples jurors, but the difference between the groups was high enough to leave non-rejection of the null hypothesis open to question even though statistical purity requires that the null hypothesis not be rejected.

H5 Death qualified jurors will not be as manifestly hostile as death scruples jurors. (Siegel Manifest Hostility Scale)

Conclusion: The difference between juror groups was not significant; therefore the null hypothesis cannot be rejected. The predicted direction of difference (DQ $\vee$ DS in manifest hostility) was observed, however.